Janagi a/p Nadarajah (joint estate administrator and dependent of Benedict a/l Thanilas, deceased) & Anor v Sjn Razali bin Budin & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-21 NCvC-38–07 OF 2020
QUAY CHEW SOON JC
14 SEPTEMBER 2021

Tort — Duty of care — Breach of duty — Deceased was arrested and was to be detained in a lockup — Deceased had existing health problems died while under police custody — Plaintiff claimed that deceased was deprived of medication and medical attention — Whether police breached duty of care by failing to provide necessary medical attention to deceased — Whether deceased died due to negligent acts, omissions or breach of statutory duty of police — Whether Government of Malaysia vicariously liable for conduct of police — Police Act 1967 s 20

Damages — Assessment — Tort — Deceased was arrested and was to be detained in a lockup — Deceased had existing health problems died while under police custody — Plaintiff claimed that deceased was deprived of medication and medical attention — Whether pain and suffering claim justified — Whether entitled to aggravated damages — Whether special damages claim too remote

The first plaintiff brought the present suit for the benefit of her and her children as dependents of the deceased under s 7 of the Civil Law Act 1956 ('the CLA') and, along with her daughter, the second plaintiff, on behalf of the deceased's estate, pursuant to s 8 of the CLA, as joint administrators. The plaintiffs' claim was for losses suffered by the deceased's estate and dependents due to the negligent acts, omissions or breach of statutory duty by the defendants which allegedly led to the death of the deceased. The deceased was a hypertensive, diabetic, stroke and heart patient who required daily medication for his various health problems. On 29 June 2017, the deceased was arrested by a group of police officers upon being suspected to be a drug dealer. His arrest was made known to the second defendant, Investigating Officer ('DW2') and the fifth defendant, the officer who ordered the deceased's arrest ('DW5'). The first plaintiff went to the police station on the same day to hand over ten types of medicines that the deceased required daily to the first defendant. On the same day, the deceased was sent to lockup to be detained for 60 days under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 beginning on 29 June 2017 until 27 August 2017 for investigation. On 7 July 2017, the deceased communicated with the first plaintiff using a mobile phone belonging to one of the officers in charge of the lockup. The deceased

A informed the first plaintiff that he had a fever and his body felt very cold. On 10 July 2017, the deceased collapsed in his detention cell. The deceased was then 'brought in dead' to Hospital Kuala Lumpur. The issues that arose for determination were: (a) whether the defendants owed a duty of care towards the deceased who was under remand and in the custody of the defendants at the B material time; (b) whether the defendants had breached the duty of care by failing to provide the necessary medical attention to the deceased; (c) whether the actions and omissions by the defendants had caused or contributed to the deceased's death; and (d) whether the defendants were liable to pay damages to the plaintiffs.

C

Held, allowing plaintiffs' claim:

(1) The deceased's constitutional right to life and liberty is guaranteed by the Federal Constitution. Upon arrest and until his death, the deceased was D in the custody and care of the police. His wellbeing was in the hands of the police for, as a detainee, he would not be in a position to have himself medically attended to, as he would a free man. The police were therefore, subject at common law and statute, to a duty to exercise reasonable care for the safety of the deceased during his detention in custody. The E defendants owed the deceased a duty of care to ensure, inter alia, that the deceased received medical attention and assistance. Based on the thin skull rule, the extent of this duty increased with the knowledge of the deceased's health condition. The court disagreed with the defendant's assertion that they did not commit any act or omission that breached the F duty of care. On the evidence of the case, the defendants had breached the duty of care by failing to provide the necessary medical attention to the deceased. the negligent actions and omissions on the part of the defendants had caused or contributed to the deceased's death (see paras 20–21).

G (2) The court found that the arresting officer ('DW1') had refused to accept the deceased's medicines when they were handed to him and the other police personnel present at the deceased's home. The court as inclined to believe P1's evidence that she had tried in vain to hand over the medication to the police officers present during the deceased's arrest. H DW1 claimed that P1 informed him that the deceased's medication were at his mother's house. This seemed implausible. Bearing in mind the deceased's ill health at the time of his arrest, it made no sense for the deceased or P1 to store the required life-dependent medicines at his mother's house. Further, DW1 failed to record these important matters I anywhere in his pocket book or subsequently in the station diary. He also failed to mention any of the above in his arrest report. Failure to record such important information is a breach of DW1's statutory duty as a police officer: reg 2(a)(46) of the Police Regulations and r 34 of the Lockup Rules) (see paras 36–37).

(3) DW1's breach of duty was two-fold. First, he failed to record vital information regarding the deceased's health anywhere in the station diary or pocketbook; and secondly, DW1 failed to ensure that this vital information was relayed to the relevant officers taking responsibility over the deceased after him. This amounts to negligence on DW1's part. Due to the failure to adhere to his statutory duties, DW1's actions initiated a chain of events that eventually caused or contributed to the death of the deceased. Therefore, DW1 had breached his duty of care towards the deceased (see para 39).

(4) The investigation officer ('DW2') owed a duty of care towards the deceased as the main officer in charge of the deceased's case. DW2 had breached his statutory duty when DW2 failed to ensure that the deceased underwent a medical check up prior to being detained in police custody. Further, DW2 failed to assign another officer to assume responsibilities over the deceased while he was away on holiday. As a result of this failure, the deceased's medical needs and wellbeing were not preserved. DW2's negligent conduct of the deceased's case had contributed to the Deceased's death. The court found that DW2's negligent conduct of the deceased's case had contributed to the deceased's death (see paras 40–43).

(5) DW3 was in charge of registration at the lockup at the material time who had received the deceased's medication from the first plaintiff. DW3 signed the 'Borang Penyerahan Ubat OKT' in which he acknowledged receipt of ten types of medicines for the deceased. This established that DW3 had personal knowledge that the deceased had been ill at the time of his detention and as such would require constant medical attention. DW3 failed to record in the station diary or anywhere in the lockup that the deceased was ill and needed his daily medication. DW3 also failed to inform the other police officers subsequently coming to be on duty of the deceased's condition and medical needs. DW3's negligence played a role in causing the deceased's death (see paras 44–45 & 47).

(6) The fourth defendant ('DW4') was on duty as the lockup sentry on the day of the deceased's demise. The court found that DW4 committed breaches of his statutory duties when he failed to perform his rounds around the lockup cells every half hour and record it in the station diary, as required by the lockup's standing order issued by the Ketua Lokap. The court found that DW4 was in breach of s 20 of the Police Act by failing to give assistance in the protection of the deceased's life. From the CCTV recording, the court observed that DW4 did not come to the deceased's aid when the latter had fallen over in his cell on the fateful day. Instead, DW4 opened the gates of neighbouring cells and enlisted several other accused persons to carry the deceased out of his cell and into a temporary holding cell. This act was a violation of DW4's statutory duty as a police

officer. DW4 failed to maintain the deceased's wellbeing at that moment and exposed the deceased to the risk of potential harm from the other inmates (see paras 48 & 50).

(7) DW5 had been one of the officers on duty at the lockup overseeing the welfare of the detainees. DW5 failed to record in the station diary or the whiteboard at the holding cells of anyone handing the detainees their food. There was no record whatsoever adduced in court in that the deceased had been given food or his medicines. This was in breach of reg 2(a)(46) of the Police Regulations. Further, DW5 breached s 20 of the Police Act by failing to provide assistance in the protection of the deceased's life when the deceased fell in his cell. DW5 had breached his statutory duty owed to the deceased and DW5's negligent acts and omissions had also contributed to the deceased's death (see paras 51–53).

(8) DW6 (one of the officers on duty at the detention area) was found to be in breach of his statutory duties and contributed to the deceased's death. DW6 failed to ensure that the information on the deceased's health and his medical needs were properly recorded in the station diary and the whiteboards in the detention area and to make a note of the deceased's alleged conditions, after he had collapsed in his cell. This failure contravened reg 2(a)(46) of the Police Regulations 1952 ('the Regulations'). DW6 also failed to ensure that the deceased duly received his medication in the lockup. After the deceased collapsed in his cell, DW6 failed to render any form of assistance to the deceased. Even after the deceased had been brought to the temporary holding cell, DW6 once again failed to render any assistance to the deceased (paras 54–55).

(9) DW7 was the Ketua Lokap in which the deceased was held. All officers on duty at the lockup were under his command and control. The court found DW7's negligent acts and omissions caused the death of the deceased. As a Ketua Lokap, DW7 breached r 10 of the Lockup Rules when he failed to ensure that the deceased was brought before a medical officer for a medical examination to determine if he was fit to be detained in lockup, neglected to record in the station diary or anywhere else of his meetings and observations with the deceased whilst the latter was in lockup, failed to record anywhere in the station diary, or even on whiteboards around the lockup, that the deceased had been ill and needed constant medical attention, neglected to ensure that the deceased received the necessary medical care and attention, failed to put in place a proper system or standard operating procedure to administer medicine to inmates who required them. The court concluded from the officers' inaction when the deceased fell over in his cell and the absence of medicine in the deceased's body when he died, that DW7 had failed in his statutory duties to ensure the protection of the deceased's life and therefore, breached s 20 of the Police Act (paras 56, 58 & 61).

(10) DW8, the investigating officer assigned to conduct investigations into the deceased's death had failed to conduct a proper investigation of the deceased's death. DW8: (a) failed to make a finding on whether a failure to record in the station diary that a detainee was sick amounts to an omission; (b) failed to investigate if the Standing Order had been complied with in this case; (c) failed to investigate if the Lockup Rules had been complied with; and (d) failed to investigate if there had been an abuse of power on the part of the police officers on duty when ordering the other inmates to carry the deceased out of his cell. DW8 failed to ensure that the second sample bag tagged 'SH2' containing the deceased's stomach contents and bile liquid reached the Jabatan Kimia along with 'SH1' for chemical analysis. The second sample bag 'SH2' went missing and remains unaccounted for. This amounted to negligence in the investigating process. DW8 only extracted CCTV footage from the date of the incident when conducting his investigations. That in itself was insufficient for DW8 to conduct a proper investigation into the deceased's death. DW8 could not possibly be able to make a finding whether the deceased had been given his medicine when only reviewing recordings on the day he died. Therefore, DW8 failed in his statutory duties to conduct a proper investigation into the deceased's death (see paras 62–64).

(11) The court found that the plaintiffs had successfully discharged their duty to prove their case. On a balance of probabilities, the plaintiffs had proven that the defendants had been negligent and derelict in their duties, which had caused the deceased's death. Arising from the negligent acts and omission against the defendants, 25th defendant's vicarious liability was established. The 25th defendant was the Government of Malaysia. Pursuant to s 5 of the Government Proceedings Act 1956, the government was liable for any wrongful act done or any neglect or default committed by any public officer. The relevant police officers in the present case were deemed to be the agents of and to be acting under the instructions of the government (see paras 69–70).

(12) Although no receipts were adduced, the court took judicial notice that funeral expenses were surely expended for the deceased by the plaintiffs and awarded RM4,000. Based on the evidence, it was plausible that the deceased would have experienced pain and suffering in the days leading up to his death. The court believed PW1's evidence that the deceased complained about being unwell during his incarceration. Likely as a result of not receiving his medication. Therefore, an award for pain and suffering is justified. The actions and omissions by the defendants had caused or contributed to the deceased's death. The plaintiff was therefore awarded: (a) RM91,800 for loss of support; (b) RM30,000 for bereavement; (c) RM4,000 for funeral expenses; (d) RM50,000 for pain

A and suffering; (e) RM100,000 as aggravated damages; and (f) RM5,500 for the costs of obtaining letters of administration (see paras 85, 87 & 107).

[Bahasa Malaysia summary

B Plaintif pertama membawa tindakan semasa bagi faedah beliau dan anak-anaknya sebagai tanggungan si mati di bawah s 7 Akta Undang-Undang Sivil 1956 ('AUS') dan, bersama anak perempuannya, plaintif kedua, bagi pihak harta pusaka si mati, menurut s 8 AUS, sebagai pentadbir bersama. Tuntutan plaintif adalah untuk kerugian yang dialami oleh harta pusaka dan C tanggungan si mati akibat perbuatan cuai, pengabaian atau kemungkiran tanggungjawab statutori oleh defendan yang didakwa membawa kepada kematian si mati. Si mati merupakan pesakit darah tinggi, kencing manis, strok dan jantung yang memerlukan ubat harian untuk pelbagai masalah kesihatannya. Pada 29 Jun 2017, si mati telah ditahan sekumpulan anggota D polis kerana disyaki pengedar dadah. Tangkapannya dimaklumkan kepada defendan kedua, Pegawai Penyiasat ('DW2') dan defendan kelima, pegawai yang mengarahkan penangkapan si mati ('DW5'). Plaintif pertama pergi ke balai polis pada hari yang sama untuk menyerahkan sepuluh jenis ubat yang E diperlukan oleh si mati setiap hari kepada defendan pertama. Pada hari yang sama, si mati telah dihantar ke lokap untuk ditahan selama 60 hari di bawah s 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 bermula pada 29 Jun 2017 sehingga 27 Ogos 2017 untuk siasatan. Pada 7 Julai 2017, si mati telah berhubung dengan plaintif pertama menggunakan telefon F bimbit milik salah seorang pegawai yang menjaga lokap. Si mati memaklumkan kepada plaintif pertama bahawa beliau demam dan badannya terasa sangat sejuk. Pada 10 Julai 2017, si mati rebah di dalam sel tahanannya. Si mati kemudiannya 'sudah dibawa mati' ke Hospital Kuala Lumpur. Isu-isu yang timbul untuk ditentukan adalah: (a) sama ada defendan mempunyai G kewajipan berjaga-jaga terhadap si mati yang berada di bawah reman dan dalam jagaan defendan pada masa yang material; (b) sama ada defendan telah melanggar kewajipan berjaga-jaga dengan gagal memberikan rawatan perubatan yang perlu kepada si mati; (c) sama ada tindakan dan pengabaian oleh defendan telah menyebabkan atau menyumbang kepada kematian si mati; H dan (d) sama ada defendan bertanggungjawab untuk membayar ganti rugi kepada plaintif.

Diputuskan, membenarkan tuntutan plaintif:

I (1) Hak perlembagaan si mati untuk hidup dan kebebasan dijamin oleh Perlembagaan Persekutuan. Selepas ditangkap dan sehingga kematiannya, si mati berada dalam tahanan dan jagaan polis. Kesejahteraannya berada di tangan polis kerana, sebagai tahanan, beliau tidak akan berada dalam kedudukan untuk mendapatkan rawatan perubatan, kerana beliau akan menjadi seorang yang bebas. Oleh itu,

polis tertakluk di bawah undang-undang am dan peruntukkan, kepada kewajipan untuk menjalankan penjagaan yang munasabah untuk keselamatan si mati semasa penahanannya dalam tahanan. Defendan mempunyai kewajipan terhadap si mati untuk memastikan, antara lain, bahawa si mati menerima rawatan dan bantuan perubatan. Berdasarkan peraturan 'tin skull', tahap tugas ini meningkat dengan pengetahuan tentang keadaan kesihatan si mati. Mahkamah tidak bersetuju dengan penegasan defendan bahawa mereka tidak melakukan apa-apa perbuatan atau pengabaian yang melanggar kewajipan berjaga-jaga. Berdasarkan keterangan kes, defendan telah melanggar kewajipan berjaga-jaga dengan gagal memberikan rawatan perubatan yang diperlukan kepada si mati. Tindakan cuai dan pengabaian pihak defendan telah menyebabkan atau menyumbang kepada kematian si mati (lihat perenggan 20–21).

(2) Mahkamah mendapati pegawai tangkapan ('DW1') enggan menerima ubat-ubatan si mati apabila ia diserahkan kepadanya dan anggota polis lain yang hadir di rumah si mati. Mahkamah yang cenderung untuk mempercayai keterangan P1 bahawa beliau telah dengan sia-sia cuba untuk menyerahkan ubat kepada anggota polis yang hadir semasa penahanan si mati. DW1 mendakwa P1 memaklumkan ubat si mati berada di rumah ibunya. Ini nampaknya tidak masuk akal. Dengan mengambil kira kesihatan si mati semasa ditangkap, ia adalah tidak masuk akal untuk si mati atau P1 menyimpan ubat-ubatan yang diperlukan di rumah ibunya. Selanjutnya, DW1 gagal merekodkan perkara penting ini di dalam mana-mana buku poketnya atau seterusnya dalam diari stesen. Beliau juga gagal menyebut mana-mana perkara di atas dalam laporan penahanannya. Kegagalan untuk merekodkan maklumat penting sedemikian adalah pelanggaran tanggungjawab statutori DW1 sebagai pegawai polis: peraturan 2(a)(46) Peraturan Polis dan r 34 Peraturan Lokap) (lihat perenggan 36–37).

(3) Pelanggaran tugas DW1 adalah dua kali ganda. Pertama, beliau gagal merekodkan maklumat penting mengenai kesihatan si mati di dalam mana-mana diari stesen atau buku poket; dan kedua, DW1 gagal memastikan maklumat penting ini disampaikan kepada pegawai berkaitan yang bertanggungjawab ke atas si mati selepasnya. Ini adalah terjumlah kepada kecuaian di pihak DW1. Disebabkan kegagalan untuk mematuhi tanggungjawab statutorinya, tindakan DW1 memulakan rantaian peristiwa yang akhirnya menyebabkan atau menyumbang kepada kematian si mati. Oleh itu, DW1 telah melanggar kewajipannya berjaga-jaga terhadap si mati (lihat perenggan 39).

(4) Pegawai penyiasat ('DW2') mempunyai tanggungjawab terhadap si mati sebagai pegawai utama yang menjaga kes si mati. DW2 telah melanggar tanggungjawab statutorinya apabila DW2 gagal memastikan si mati menjalani pemeriksaan kesihatan sebelum ditahan dalam tahanan polis.

Tambahan pula, DW2 gagal menugaskan pegawai lain untuk mengambil tanggungjawab ke atas si mati semasa beliau pergi bercuti. Akibat kegagalan ini, keperluan perubatan dan kesejahteraan si mati tidak terpelihara. Kelakuan cuai DW2 terhadap kes si mati telah menyumbang kepada kematian si mati. Mahkamah mendapati kecuaian DW2 terhadap kes si mati telah menyumbang kepada kematian si mati (lihat perenggan 40–43).

(5) DW3 bertanggungjawab untuk pendaftaran di lokap pada masa material yang telah menerima ubat si mati daripada plaintif pertama. DW3 menandatangani 'Borang Penyerahan Ubat OKT' di mana beliau mengaku menerima sepuluh jenis ubat untuk si mati. Ini membuktikan bahawa DW3 mempunyai pengetahuan peribadi bahawa si mati telah sakit pada masa penahanannya dan oleh itu memerlukan perhatian perubatan yang berterusan. DW3 gagal merekodkan dalam diari stesen atau di mana-mana di lokap bahawa si mati sakit dan memerlukan ubat hariannya. DW3 juga gagal memaklumkan kepada pegawai polis lain yang kemudiannya datang bertugas mengenai keadaan dan keperluan perubatan si mati. Kecuaian DW3 memainkan peranan dalam menyebabkan kematian si mati (lihat perenggan 44–45 & 47).

(6) Defendan keempat ('DW4') bertugas sebagai pengawal lokap pada hari kematian si mati. Mahkamah mendapati bahawa DW4 melakukan pelanggaran tanggungjawab statutorinya apabila beliau gagal melakukan pusingan di sekitar sel lokap setiap setengah jam dan merekodkannya dalam diari stesen, seperti yang dikehendaki oleh perintah tetap lokap yang dikeluarkan oleh Ketua Lokap. Mahkamah mendapati DW4 melanggar s 20 Akta Polis kerana gagal memberi bantuan dalam perlindungan nyawa si mati. Daripada rakaman kamera litar tertutup (CCTV), mahkamah mendapati DW4 tidak datang membantu si mati apabila si mati terjatuh di dalam selnya pada hari malang tersebut. Sebaliknya, DW4 membuka pintu sel bersebelahan dan meminta beberapa tertuduh lain untuk membawa si mati keluar dari selnya dan masuk ke dalam sel tahanan sementara. Perbuatan ini adalah melanggar tanggungjawab statutori DW4 sebagai pegawai polis. DW4 gagal menjaga kesejahteraan si mati pada masa itu dan mendedahkan si mati kepada risiko potensi bahaya daripada banduan lain (lihat perenggan 48 & 50).

(7) DW5 adalah salah seorang pegawai yang bertugas di lokap yang mengawasi kebajikan para tahanan. DW5 gagal merekodkan dalam diari stesen atau papan putih di sel tahanan sesiapa yang menyerahkan makanan kepada tahanan. Tiada sebarang rekod yang dikemukakan di mahkamah bahawa si mati telah diberi makanan atau ubat-ubatannya. Ini melanggar peraturan 2(a)(46) Peraturan Polis. Selanjutnya, DW5 melanggar s 20 Akta Polis apabila gagal memberikan bantuan dengan

melindungi nyawa si mati apabila si mati rebah dalam selnya. DW5 telah melanggar tanggungjawab statutorinya terhadap si mati dan tindakan dan pengabaian DW5 yang cuai juga telah menyumbang kepada kematian si mati (lihat perenggan 51–53). A

(8) DW6 (salah seorang pegawai yang bertugas di kawasan tahanan) didapati melanggar tanggungjawab statutorinya dan menyumbang kepada kematian si mati. DW6 gagal memastikan maklumat kesihatan si mati dan keperluan perubatannya direkodkan dengan betul dalam diari balai dan papan putih di kawasan tahanan serta membuat catatan mengenai dakwaan keadaan si mati, selepas beliau rebah di dalam selnya. Kegagalan ini melanggar peraturan 2(a)(46) Peraturan Polis 1952 ('Peraturan tersebut'). DW6 juga gagal memastikan si mati menerima ubatnya di dalam lokap. Selepas si mati rebah di dalam selnya, DW6 gagal memberikan sebarang bentuk bantuan kepada si mati. Walaupun selepas si mati telah dibawa ke sel tahanan sementara, DW6 sekali lagi gagal memberi sebarang bantuan kepada si mati (lihat perenggan 54–55). B C D

(9) DW7 ialah Ketua Lokap di mana si mati ditahan. Semua pegawai yang bertugas di lokap berada di bawah perintah dan kawalannya. Mahkamah mendapati perbuatan cuai dan pengabaian DW7 menyebabkan kematian si mati. Sebagai Ketua Lokap, DW7 melanggar peraturan 10 Peraturan Lokap apabila beliau gagal memastikan si mati dibawa kepada pegawai perubatan untuk pemeriksaan kesihatan bagi menentukan sama ada beliau sihat untuk ditahan di lokap, abai untuk merekodkan dalam diari balai atau di mana-mana sahaja berkenaan perjumpaan dan pemerhatiannya dengan si mati semasa si mati berada dalam lokap, gagal merekodkan di mana-mana dalam diari stesen, atau bahkan pada papan putih di sekitar lokap, bahawa si mati telah sakit dan memerlukan rawatan perubatan yang berterusan, diabaikan untuk memastikan bahawa si mati menerima rawatan dan perhatian perubatan yang diperlukan, gagal menyediakan sistem atau prosedur operasi standard yang betul untuk memberikan ubat kepada banduan yang memerlukannya. Mahkamah membuat kesimpulan daripada ketidakaktifan pegawai apabila si mati rebah di dalam selnya dan ketiadaan ubat dalam tubuh si mati apabila beliau meninggal dunia, bahawa DW7 telah gagal dalam tanggungjawab statutorinya untuk memastikan perlindungan nyawa si mati dan oleh itu, melanggar s 20 Akta Polis (lihat perenggan 56, 58 & 61) E F G H

(10) DW8, Pegawai Penyiasat yang ditugaskan untuk menjalankan siasatan terhadap kematian si mati telah gagal menjalankan siasatan yang sewajarnya terhadap kematian si mati. DW8: (a) gagal membuat dapatan sama ada kegagalan untuk merekodkan dalam diari stesen bahawa seseorang tahanan sakit adalah pengabaian; (b) gagal menyiasat sekiranya Perintah Tetap telah dipatuhi dalam kes ini; (c) gagal menyiasat sekiranya I

Peraturan Lokap telah dipatuhi; dan (d) gagal menyiasat jika terdapat penyalahgunaan kuasa di pihak pegawai polis yang bertugas apabila mengarahkan banduan lain membawa si mati keluar dari selnya. DW8 gagal memastikan beg sampel kedua bertanda 'SH2' mengandungi kandungan perut dan cecair hempedu si mati sampai ke Jabatan Kimia bersama 'SH1' untuk analisis kimia. Beg sampel kedua 'SH2' hilang dan tidak dapat dikesan. Ini terjumlah kepada kecuaian dalam proses penyiasatan. DW8 hanya mengeluarkan rakaman CCTV dari tarikh kejadian ketika menjalankan siasatannya. Itu dengan sendiri tidak mencukupi untuk DW8 menjalankan penyiasatan sewajarnya terhadap kematian si mati. DW8 tidak mungkin dapat membuat dapatan sama ada si mati telah diberi ubat apabila hanya menyemak rakaman pada hari kematiannya. Oleh itu, DW8 gagal dalam tanggungjawab statutorinya untuk menjalankan penyiasatan sewajarnya ke atas kematian si mati (lihat perenggan 62–64).

(11) Mahkamah mendapati bahawa plaintif telah berjaya melepaskan tanggungjawab mereka untuk membuktikan kes mereka. Pada imbangan kebarangkalian, plaintif telah membuktikan bahawa defendan telah cuai dan lalai dalam tugas mereka, yang telah menyebabkan kematian si mati. Akibat daripada tindakan cuai dan pengabaian terhadap defendan, liabiliti vikarius defendan ke-25 telah dibuktikan. Defendan ke-25 ialah Kerajaan Malaysia. Menurut s 5 Akta Prosiding Kerajaan 1956, Kerajaan bertanggungjawab ke atas apa-apa perbuatan salah yang dilakukan atau sebarang pengabaian atau keingkaran yang dilakukan oleh mana-mana pegawai awam. Pegawai polis yang berkaitan dalam kes ini disifatkan sebagai ejen dan bertindak di bawah arahan kerajaan (lihat perenggan 69–70).

(12) Walaupun tiada resit dikemukakan, mahkamah mengambil pendekatan kehakiman bahawa perbelanjaan pengebumian sudah pasti dibelanjakan untuk si mati oleh plaintif dan membenarkan award RM4,000. Berdasarkan keterangan, ia adalah munasabah bahawa si mati akan mengalami kesakitan dan penderitaan pada hari-hari kematiannya. Mahkamah percaya keterangan PW1 bahawa si mati mengadu kurang sihat semasa dipenjarakan. Berkemungkinan akibat tidak menerima ubatnya. Oleh itu, award untuk kesakitan dan penderitaan adalah wajar. Tindakan dan pengabaian defendan telah menyebabkan atau menyumbang kepada kematian si mati. Oleh itu, plaintif telah dibenakan: (a) RM91,800 untuk kehilangan penyara; (b) RM30,000 untuk kematian; (c) RM4,000 untuk perbelanjaan pengebumian; (d) RM50,000 untuk kesakitan dan penderitaan; (e) RM100,000 sebagai ganti rugi teruk; dan (f) RM5,500 untuk kos mendapatkan surat pentadbiran (lihat perenggan 85, 87 & 107).]

Cases referred to

Azizi bin Amran v Hizzam bin Che Hassan [2006] 4 MLJ 555; [2006] 2 CLJ 821; [2006] 4 AMR 381, CA (refd)

Caparo Industries plc v Dickman and others [1990] 1 All ER 568, HL (refd)

Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353; [2014] 9 CLJ 15, CA (refd)

DNC Asiatic Holdings Sdn Bhd & Ors v Honda Giken Kogyo Kabushiki Kaisha & other appeals [2020] 1 CLJ 799, CA (refd)

Ellis v Home Office [1953] 2 All ER 149, CA (refd)

Howard v Jarvis (1958) 98 CLR 177, HC (refd)

Kalaivanan a/l Sundarajoo & Anor v Poo Cheng Hock [2017] 9 MLJ 806; [2017] 4 MLRH 370, HC (refd)

Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals [2018] 3 MLJ 184; [2017] 6 MLRA 635, FC (distd)

Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor [2021] 3 MLJ 365; [2021] 3 MLRA 424; [2021] 6 CLJ 157, FC (folld)

Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (administrator of the estate and dependant of Chandran a/l Perumal, deceased) & Anor [2018] 4 MLJ 133; [2018] MLRAU 129; [2018] 8 CLJ 529, CA (refd)

Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734; [2015] 7 CLJ 1008, FC (refd)

Low Suit (MW) & Tan Mee Kiau v Lim Sun Hiang & Anor [1991] 3 MLRH 539, HC (refd)

Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 5 MLJ 360; [2013] 6 CLJ 958, CA (refd)

Sam Wun Hoong v Kader Ibramshah [1981] 1 MLJ 295, FC (refd)

Selvi a/p Narayan & Anor (joint administrator for the estate and dependant of Chandran a/l Perumal, deceased) v Koperal Zainal bin Mohd Ali & Ors [2017] 9 MLJ 300; [2017] 5 CLJ 84, HC (refd)

Suzana Md Aris v DSP Ishak Hussain & Ors [2010] 6 CLJ 712, HC (refd)

Takong Tabari v Government of Sarawak & Ors and another appeal [1998] 4 MLJ 512; [1998] 2 MLRA 101, CA (refd)

Tan Lin Siew & Anor v Syed Hussein bin Alwi [1987] 2 MLJ 53, SC (refd)

Tan Sri Norian Mai & Anor v Suzana Md Aris [2011] 1 LNS 1912, CA (refd)

Teoh Meng Kee v Public Prosecutor [2014] 5 MLJ 741; [2014] 7 CLJ 1034, CA (refd)

Tony Pua Kiam Wee v Government of Malaysia and another appeal [2019] 12 MLJ 1; [2020] 1 CLJ 337, FC (refd)

Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175, FC (refd)

Yeap Cheng Hock v Kajima-Taisei Joint Venture [1973] 1 MLJ 230 (folld)

Legislation referred to

Civil law Act 1956 ss 7, 7(2), (3)(ii), (3)(iv)(a), (3)(iv)(d), (3A), (3B), 8, 8(2), (5)
Criminal Procedure Code s 337
Dangerous Drugs (Special Preventive Measures) Act 1985 s 3(1)
Evidence Act 1950 ss 101, 102, 103, 114(g)
Federal Constitution art 5
Government Proceedings Act 1956 s 5
Lockup Rules 1953 rr 10, 14, 34, 36, 38, 40, 42
Police Act 1967 s 20, 20(3)(m), (4)
Police Regulations 1952 reg 2(a), (a)(46)

M Visvanathan (V Sanjay Nathan with him) (Saibullah MV Nathan & Co) for the plaintiffs.
Aisyaf Falina Abdullah (Senior Federal Counsel, Attorney General's Chambers) for the defendants.

Quay Chew Soon JC:

INTRODUCTION

[1] The first plaintiff ('P1') is the lawful wife of Benedict a/l Thanilas ('deceased') and joint administrator of the deceased's estate. P1 brought this suit for her benefit and her children's benefit as dependents of the deceased under s 7 of the Civil law Act 1956 ('the Civil Law Act') and on behalf of the deceased's estate under s 8 of the Civil law Act 1956. The second plaintiff ('P2') is the daughter of the deceased and joint administrator of the deceased's estate. P2 brought this suit on behalf of the deceased's estate under s 8 of the Civil Law Act. P1 and P2 are collectively referred to as the 'plaintiffs'.

[2] The plaintiffs' claim is for losses suffered by the deceased's estate and dependents due to the negligent acts, omissions or breach of statutory duty by the defendants which allegedly led to the death of the deceased. After a full trial, I gave judgment in favour of the plaintiffs. These are the grounds of my judgment.

BACKGROUND

[3] The deceased was a hypertensive, diabetic, stroke and heart patient who required daily medication for his various health problems. On 29 June 2017 at around 10.30am, the deceased was arrested at his home in Jinjang, Kuala Lumpur by a group of police officers led by the first defendant. The deceased was suspected to be a drug dealer. He was brought to lbu Pejabat Polis Daerah Sentul where his arrest was made known to the investigating officer (ie the

second defendant) and the officer who ordered the deceased's arrest (ie the fifth defendant).

[4] P1 went to the offices of Bahagian Siasatan Jenayah Narkotik IPD Sentul at around 3.30pm on the same day to hand over ten types of medicines that the deceased required daily to the first defendant. At around 6.30pm on the same day, the deceased was sent to Lokap Berpusat Jinjang, Kuala Lumpur ('lockup') to be detained for 60 days under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 beginning on 29 June 2017 until 27 August 2017 for investigation. On 7 July 2017 at around 10pm, the deceased communicated with P1 using a mobile phone belonging to one of the officers in charge of the lockup. The deceased informed P1 that he had a fever and his body felt very cold. On 10 July 2017 at around 5.10am, the deceased collapsed in his detention cell whilst urinating. At 6.06am, the deceased was 'brought in dead' to Hospital Kuala Lumpur.

ISSUES FOR DETERMINATION

[5] The primary issues for determination in this case are:

(a) whether the defendants owed a duty of care towards the deceased who was under remand and in the custody of the defendants at the material time;

(b) if yes, whether the defendants had breached the duty of care by failing to provide the necessary medical attention to the deceased;

(c) if yes, whether the actions and omissions by the defendants had caused or contributed to the deceased's death; and

(d) if yes, whether the defendants are liable to pay damages as pleaded by the plaintiffs in their statement of claim.

Rights of the deceased and general duties of the Police

[6] Article 5 of the Federal Constitution guarantees the deceased's right to life and liberty. The deceased had not yet been charged, tried or convicted for any crime. The deceased had been arrested and detained for an alleged drug offence pursuant to s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985.

[7] Section 20 of the Police Act 1967 ('Police Act') outlines the general duties of police officers. This includes a duty to give 'assistance in the protection of life and properly' pursuant to s 20(3)(j) thereof. Further, s 20(3)(m) read together with s 20(4) deems a police officer 'guarding prisoners

A and other persons in the custody of the police' as a prison officer with corresponding powers and duties.

[8] The Lockup Rules 1953 ('Lockup Rules'), inter alia, provides for medical inspection on admission. Rule 10 reads:

B

> The Medical Officer shall so far as possible examine every prisoner as soon as possible after admission to a lockup and shall *certify whether the prisoner is fit for imprisonment* and, if convicted the class of labour which he can perform.

C **[9]** The Lockup Rules provide for notification without delay to the Medical Officer of 'any case of apparent mental disorder or of injury to or *illness of any prisoner*' (r 36). And for the entry in a journal of the Medical Officer's 'comments on the *state* of the lockup and the *prisoners* confined therein' (r 38). The journal that is be maintained must record '*all matters and occurrences of* D *importance*, including the number of prisoners in custody after each meal, and these *entries shall be dated and signed daily*' (r 34). Assessment as to the health condition and life of a prisoner is to be made by the Medical Officer pursuant to r 40 which reads: 'Whenever the Medical Officer is of the opinion that the *life of any prisoner will be in danger by his continued confinement* in a lockup or E that any *prisoner is totally and permanently unfit for confinement*, he shall immediately state his opinion and the grounds thereof in writing …'. Notices in four different languages setting forth the facilities to which prisoners are entitled as regards, inter alia, 'the *provision of medical assistance*' shall be F displayed at the entrance to each lockup (r 14). Subordinate police officers and constables 'shall at all times be *responsible for the safe custody of prisoners* under their charge' (r 42).

[10] The police also have a duty to abide by the Police Regulations 1952 G ('Police Regulations'). Under reg 2(a) thereof, a police officer is guilty of an offence against discipline if he:

(a) 'is idle or *negligent in the performance of his duty*, or … *smokes while on duty*;' (para 38);

H (b) '… *neglects to make any entry* in any official record, register, book or other document which it is his duty to make;' (para 46); or

(c) '*neglects to render any assistanc*e to any person taken ill or injured …' (para 60).

I *Duty of care*

[11] The law on negligence is well established. The essential elements of actionable negligence are: (i) the existence of a duty to take care owing to the plaintiff by the defendant; (ii) breach of the duty of care; and (iii) damage

suffered by the plaintiff as a result of the breach. In *Projek Lebuh Raya Utara-Selatan Sdn Bhd v Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 5 MLJ 360 at p 382; [2013] 6 CLJ 958 at p 984, the Court of Appeal explained:

> [67] Negligence is a tort and three things must be proved to support the claimant's claim:
>
> (a) that the defendant owes the claimant plaintiff a *duty of care*;
>
> (b) that the defendant is in *breach of that duty of care*; and
>
> (c) that the claimant plaintiff suffers *damage as a result of that breach of duty* and that damage is not too remote.
>
> [68] According to Alderson B in *Blyth v The Company of Proprietors of the Birmingham Waterworks* [1856] 11 Ex 781 at p 784:
>
> > *Negligence* is the *omission to do something which a reasonable man*, guided upon those considerations which ordinarily regulate the conduct of human affairs, *would do*, or *doing something which a prudent and reasonable man would not do*.
>
> [69] The standard of conduct to determine negligence is that of the reasonable man. It is an objective test.
>
> [70] The *Caparo* test derived from the case of *Caparo Industries Plc v Dickman and Others* [1990] 2 AC 605 is usually applied to cases involving physical injury and/or damage to property. The *Caparo* test requires the court to ask three basic questions:
>
> (a) whether the *damage is reasonably forseeable?*
>
> (b) whether there is a *relationship of proximity* between the claimant plaintiff and the defendant?
>
> (c) whether it is *just, fair and reasonable to impose a duty* in such a situation?

[12] In *Caparo Industries plc v Dickman and others* [1990] 1 All ER 568, the House of Lords enunciated the test for deciding if a duty of care is owed. Essentially, the requirements are: (i) foreseeability of damage; (ii) a relationship characterised as one of 'proximity' or 'neighbourhood'; and (iii) the situation is one that the court considers it fair, just and reasonable to impose a duty of care. The *Caparo* test was adopted by the Federal Court in *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734 at p 751; [2015] 7 CLJ 1008 at p 1025 which said:

> [44] To put it in a nutshell the *preferred test is the threefold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence*. The threefold test has been recognised by the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605, as the elements giving rise to a duty of care. In thejudgment of Lord Bridge in *Caparo* at pp 617–618, His Lordship said that:
>
> > What emerges is that, in addition to the *foreseeability of damage*, necessary ingredients in any situation giving rise to a duty of care are that there should exist

between the party owing the duty and the party to whom it is owed a *relationship characterised by the law as one of 'proximity' or 'neighbourhood'* and that the situation should be one in which the court considers it f*air, just and reasonable that the law should impose a duty* of a given scope on the one party for the benefit of the other.

[13] In dealing with a situation of a person in the custody of the police, the High Court of Australia in *Howard v Jarvis* (1958) 98 CLR 177 at 183 said:

> We feel no doubt that the learned judges of the Supreme Court of Tasmania were *right in holding that Howard was subject at common law to a duty to exercise reasonable care for the safety of Jarvis during his detention in custody.* He had *deprived Jarvis of his personal liberty, and assumed control of his person*. In arresting and detaining Jarvis he was no doubt acting lawfully and properly and in the due execution of his duty, but he was depriving Jarvis of his liberty, and he was assuming control for the time being of his person, and it necessarily followed, in our opinion, that he came under a *duty to exercise reasonable care for the safety of his person during the detention.*

[14] The duty of care by the authorities towards prisoners was explained by the English Court of Appeal in *Ellis v Home Office* [1953] 2 All ER 149 at p 154:

> The *duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within*, and that includes those who are within against their wish or will, of whom the plaintiff was one.

[15] The duty of care owed to detainees stems from the fact that they have been deprived of their liberty and taken into custody by the authorities. This includes a duty take reasonable care for the safety of the person in custody be it through negligence of police officers, through acts of other detainees or even in situations where the persons in custody harm themselves. *Halsbury's Laws of England* (Vol 37, 4th Ed) reads:

> The *duty on those responsible for one of Her Majesty's prisons is to take reasonable care for the safety of those who are within, including the prisoners.* Actions will lie, for example, where a prisoner sustains injury as a result of the negligence of prison staff; or at the hands of another prisoner in consequence of the *negligent supervision of the prison authorities, with greater care and supervision, to the extent that is reasonable and practicable, being required of a prisoner known to be potentially at greater risk than other prisoners*; or if negligently put to work in conditions damaging to health; or if inadequately instructed in the use of machinery; or if injured as a result of defective premises.

[16] The following cases illustrate the duty of care owed to persons in custody. The High Court's decision in *Suzana Md Aris v DSP Ishak Hussain & Ors* [2010] 6 CLJ 712 was set aside by the Court of Appeal on grounds that negligence as a cause of action was not pleaded (see *Tan Sri Norian Mai & Anor*

v Suzana Md Aris [2011] 1 LNS 1912). However, the reasoning that a duty of care exists is still valid. The High Court said (at p 718):

> [25] An absence of evidence of assault or mistreatment however does not exonerate the defendants from liability. *As a detainee the deceased would not be free to have himself medically attended to as he would a free man*. Having taken the deceased lawfully under its custody his *wellbeing was in the hands of the police* for as a detainee he would not be in a position to have himself medically attended to as he would a free man. The *police therefore owed him a duty of care to ensure the appropriate medical care would be extended to him during the period he was in its custody* within the criteria set in *Caparo Industries pic v Dickman & Or*s.

[17] In *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353 at p 375; [2014] 9 CLJ 15 at p 41 ('Kugan'), the Court of Appeal said:

> [47] ... The *police force* is a public professional body and as in other professional bodies there exist *duties of care in their discharge of their powers*. In the context of the police force, it is their standard operating procedure (SOP) and that should be subject to scrutiny by the court of law. As to what that duty of care and standard of care are depend on the circumstances of each individual case and it is for the courts to determine what that duty and standard of care are ...

[18] In *Selvi a/p Narayan & Anor (joint administrator for the estate and dependant of Chandran a/l Perumal, deceased) v Koperal Zainal bin Mohd Ali & Ors* [2017] 9 MLJ 300 at 337; [2017] 5 CLJ 84 at p 117 ('Koperal Zainal'), the High Court said:

> [127] ... In my view, there is no question that *there is a duty of care which is owed by the police to those who are held in detention*. No doubt, the detention itself may be lawful in the sense that there may have been a valid basis for their arrest. The issue is not about the arrest or the lawfulness of the detention or remand order but whether the *detaining authorities owe a duty of care to the detainees whilst they are in detention in the police lock-up.*
>
> [128] In my view, both under common law and under statute, there is a duty of care to ensure that the detainee is not harmed by the police or by other detainees or that they do not harm themselves. Insofar as the common law is concerned, the principle is well established by the cases referred to above and it is trite that *detaining authorities do owe a duty of care to ensure that the detainees/prisoners are healthy and are given proper medical care* during the period of incarceration. There is also a duty to ensure that the detainees are not harmed by the detaining authorities or by other inmates or even self-harm or suicide. In this regard, it is relevant to refer to the judgment of Lord Bingham of Cornhill in Amin, *R (on the application of) v Secretary Of State For The Home Department* ... which lucidly illustrates the *general duty of care that is imposed on the police* or prison authorities. In this context, it is necessary to acknowledge that the late Lord Bingham has been one of the greatest proponents of the rule of law in recent times. He drew inspiration from Indian jurisprudence and

said, A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. The *state owes a particular duty to those involuntarily* in its custody. As Anand J succinctly put it in *Nilabati Behera v State of Orissa* (1993) 2 sec 746 at 767:

> There is a *great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life.*

Such persons must be protected against violence or abuse at the hands of state agents. They must be protected against self-harm: *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360. *Reasonable care must be taken to safeguard their lives* and persons against the risk of avoidable harm.

[129] Insofar as statutory duties are concerned, in a general sense, reference may be made to s 20 of the Police Act 1967 and the Police Regulations 1952. But the more specific statutory duty arises under the Lock-up Rules 1953, which the defendants here assert has been fully complied with. I have comprehensively referred to the Lock-up Rules 1953 in the earlier part of this judgment. Based on the Lock-up Rules 1953 referred to above, it is clear that the *police have a positive duty to ensure that detainees who are sick are duly attended to* and in particular, when a detainee suffers from any form of mental illness, then special attention has to be given to this situation and appropriate steps have to be taken accordingly (see: r 36 of the Lock-up Rules 1953). In my view, the Lock-up Rules 1953 are a complete code which governs the handling and management of detainees. Thus, detainees would be safe from harm or self-harm if the detaining authorities abide by the Lock-up Rules 1953 and ensure that they are fully complied with. Hence, to conclude on this point, it is my view that the *police do have a duty of care towards those who are under detention* during investigations. In the present context, the content of that duty is regulated inter alia by the Lock-up Rules 1953.

[19] The defendants in *Koperal Zainal* appealed to the Court of Appeal (see *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor* [2021] 3 MLJ 365; [2021] 3 MLRA 424; [2021] 6 CLJ 157) and the Federal Court (see *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (administrator of the estate and dependant of Chandran a/l Perumal, deceased) & Anor* [2018] 4 MLJ 133; [2018] MLRAU 129; [2018] 8 CLJ 529). However, liability was not in issue before both appellate courts. Thus, the High Court's finding of liability against the defendants in that case remains undisturbed.

FINDINGS OF THE COURT

[20] My opinion is this. The deceased's constitutional right to life and liberty is guaranteed by the Federal Constitution. Upon arrest and until his death, the deceased was in the custody and care of the police. His wellbeing was in the hands of the police for, as a detainee, he would not be in a position to have

himself medically attended to, as he would a free man. The police is therefore subject, at common law and statute, to a duty to exercise reasonable care for the safety of the deceased during his detention in custody. The defendants owed the deceased a duty of care to ensure, inter alia, that the deceased received medical attention and assistance. Based on the thin skull rule, I would go on to say that the extent of this duty increased with the knowledge of the deceased's health condition.

[21] In submissions, the defendants concede that they have a duty of care to the deceased (see para 33 of the defendants' written submissions). But the defendants assert that they did not commit any act or omission that breached the duty of care. I disagree. Based on the evidence, it is my finding that the defendants had breached the duty of care by failing to provide the necessary medical attention to the deceased. I find that the negligent actions and omissions on the part of the defendants had caused or contributed to the deceased's death.

[22] There were four witnesses for the plaintiffs namely: (i) PW1 ie P1; (ii) PW2 ie the pathologist who conducted post mortem examination on the deceased; (iii) PW3 ie the deceased's employer; and (iv) PW4 ie P2.

Testimony of PW1 (ie P1)

[23] PW1's testimony is this. On 29 June 2017 at around 10.30am, several police officers from the Bahagian Narkotik IPD Sentul led by the first defendant arrived at her home to arrest the deceased. The officers informed PW1 that they intended to bring the deceased to IPD Sentul. At the material time, the deceased was asleep inside the bedroom in the house. The police officers entered the house and led the deceased out of the bedroom and into the living room. PW1 informed the arresting officers that the deceased had been ill, having undergone a bypass surgery not long ago. The deceased had required to take 8 types of medicines a day for his various illnesses. PW1 was informed by the officers that the deceased was being detained and that they said: 'kita nak bawa suami you pergi medical check up. Itu tak payah you takut'.

[24] During the arrest, PW1 had tried to hand over the deceased's medication to the police officers. However, they had refused to take the medicines. The deceased was then brought to IPD Sentul. At around 3pm, PW1 received a call from a police officer from IPD Sentul, requesting that she bring all of the deceased's medication to IPD Sentul. PW1 then arrived at IPD Sentul at around 3.30pm the same day, bringing with her the deceased's medication. This is corroborated by the 'Borang Penyerahan Ubat OKT' (which was produced at p 10 of the Common Bundle of Documents marked as '81'). It list out ten different types of medicines for 'tekan darah tinggi/jantung

lemah', elak dada sakit', 'kolesterol', 'cair darah' and 'kencing manis'.

[25] PW1 was informed by the police officers that the deceased would be detained at Lokap Berpusat Jinjang. PW1 visited the deceased at the lockup on 3 July 2017. During the visit, PW1 described the deceased as being sad and worried about his family. During the trial, CCTV recording was played in court which showed PW1 climbing onto the ledge of the speaking glass panel in order to hear what the deceased was saying.

[26] On 7 July 2017 at around 10pm, PW1 received a phone call from the deceased using a mobile phone belonging to one of the sentries at the lockup. During the phone call, the deceased informed PW1 that he was unwell. PW1 told the deceased that she would visit him again on 10 July 2017. However, on 10 July 2017, PW1 received a phone call from the police telling her to go to the Emergency Department of Hospital Kuala Lumpur immediately. At the hospital, PW1 was informed that the deceased had passed away. PW1 was informed by the second defendant that the deceased had died due to *'sesak nafas'*.

[27] The deceased had been employed with NS Arjunan Construction, working as a driver beginning from August 2016 till June 2017. This is corroborated by the deceased's salary payment slips (which were produced at pp 11–16 of the Common Bundle of Documents marked as '81').The deceased had been gainfully employed at the material time and had been giving PW1 and their children money for their expenses. PW1 had been receiving a sum of approximately RM800 to RM900 a month from the deceased. PW1 testified that the funeral costs had been about RM10,000 as well as RM3,500 being the costs for travelling to the Kuala Lumpur courts to attend the inquest proceedings. PW1 also testified that RM5,500 had been the cost for obtaining the letters of administration, which enabled her to commence this suit in court.

[28] I am cognizant that PW1's testimony can be self-serving as she is the plaintiff in this suit. Nevertheless, PW1 strikes me as a truthful witness. Her testimony regarding the deceased's medication is supported by documentary evidence ie the 'Borang Penyerahan Ubat OKT'. From the CCTV recording, I observe that PW1 climbed onto the ledge of the speaking glass panel in order to hear what the deceased was saying. This suggest that the deceased's speech was faint. It is probable that the deceased was not in good health as a result of not receiving his medicines. PW1's testimony that the deceased complained about being unwell is believable. On balance, I accept the evidence of PW1.

Testimony of PW2

[29] PW2 is the forensic pathologist who had conducted the post mortem

examination on the deceased's body. He had previously testified during the inquest proceedings in the Coroner's Court. PW2's testimony is this. The deceased was 'brought in dead' to Hospital Kuala Lumpur on 10 July 2017. The phrase 'brought in dead' is used when a doctor is brought a patient who no longer showed any signs of life. It means that the patient had died outside of the hospital. Based on the post mortem report that PW2 had prepared, the deceased's cause of death had been 'Acute Myocardial Infarction due to Coronary Bypass Graft Disease' and 'Hypertension, Diabetes Melitus and Stroke'. The deceased had been ill prior to his death. During examination-in-chief, PW2 testified that the deceased's medication had been crucial to treat his various illnesses:

> A: Yang Arif berdasarkan pemeriksaan daripada bedah siasat ini dan penemuan-penemuan di dalam bedah siasat ini ia menunjukkan bahawa *si mati ini tidak sihat sebelum dia mati* Yang Arif.
>
> Q: Tadi saya telah merujuk doktor kepada gambar ubat-ubatan dan doktor sendiri pun telah memberikan keterangan bahawa ini adalah ubat-ubatan kepunyaan si mati. Soalan saya, apakah ubat-ubatan ini merupakan sesuatu yang amat penting bagi si mati?
>
> A: Yang Arif *ubat-ubatan ini memang sangat penting kepada si mati untuk mengatasi ataupun merawat penyakitnya Yang Arif.*
>
> Q: Dan di dalam kes ini terdapat apa-apa keterangan ataupun apa-apa bukti yang doktor telah jumpa bahawa si mati ini telah mengambil ubat-ubatanya sebelum kematian beliau?
>
> A: Yang Arif, saya ada mengambil spesimen darah, urin, darah, air kencing, kandungan perut dan juga cecair hempedu untuk dianalisa di Jabatan Kimia. Walau bagaimanapun saya hanya menerima analisa terhadap darah dan urin. *Di dalam darah dan urin tidak ada ditemukan apa-apa ubatan si mati* Yang Arif.
>
> Q: *Bermaksud sebelum kematian si mati tidak ada apa-apa ubat-ubatan di dalam sistem badan si mati?*
>
> A: Berdasarkan analisa kimia yang di serahkan kepada saya memang *tidak ada sebarang trace ataupun ubat-ubatan yang dikesan di dalam darah dan air kencing si mati Yang Arif.*

[30] During the post mortem examination, PW2 had obtained: (i) blood; (ii) urine; (iii) stomach contents; and (iv) bile samples for analysis at the Jabatan Kimia. However, PW2 only received the analysis for the: (i) blood; and (ii) urine samples. Based on these two samples, PW2 detected no trace of any medication within the deceased's system when he died. In relation to the missing: (i) stomach; and (ii) bile samples, PW2 testified that he had handed four bottles of samples to the police to be sent to the Jabatan Kimia. The four bottles contained: (i) blood; (ii) urine; (iii) stomach; and (iv) bile samples respectively. However, the Jabatan Kimia only received two samples. To this day, the missing: (i) stomach; and (ii) bile samples remain unaccounted for.

PW2 further testified that there is a possibility the deceased would still be alive if he had taken his medication:

> Q: Dr Fizam ya, cuba perhatikan secara ringkasnya tadi doktor telah menyatakan bahawa orang ini sakit, *si mati ini sakit, memerlukan ubat dan perlu mengambil ubat-ubatannyalah?*
>
> A: *Benar* Yang Arif.
>
> Q: Didalam kes ini adakah *kematian ini merupakan satu yang boleh dielakkan sekiranya si mati telah mengambil ubat-ubatannya?*
>
> A: Yang Arif berdasarkan pemeriksaan saya *jika si mati mengambil ubat-ubatannya maka peluang untuk dirinya masih hidup itu tetap ada Yang Arif.*
>
> Q: So, bermaksud orang ini memerlukan rawatan dan perhatian bagi mengelakkan pemerhatian medicallah perubatan ya? Ianya menjadi satu perkara crucial di dalam kes ini?
>
> A: Benar Yang Arif.

[31] I consider the evidence of PW2 convincing and uncontroverted. He is a government employed forensic pathologist who performed an autopsy on the deceased. His involvement in this suit is in a professional capacity PW2 is a disinterested witnesses who does not derive any personal benefit from this case. There is no reason for him to be anything other than impartial and objective. I therefore have no hesitation accepting his evidence.

Testimony of PW3

[32] PW3 is the proprietor and owner of the construction firm NS Arjunan. His testimony is this. Prior to the deceased's death, PW3 had been his employer and the deceased had been gainfully employed with PW3's firm. The deceased began working for PW3 in July 2016. He had worked at PW3's firm until June 2017, before he passed away in July 2017. The deceased had previously been a lorry driver for PW3's firm. But due to his poor health following a heart bypass, he stopped carrying out heavy duty work. He then became the driver for PW3's workers, ferrying them to and from work in his car. The deceased had been employed on a daily basis.

Each day that he worked, he earned RM60. Based on the salary payment slips, the deceased had earned approximately RM1,200 to RM1,500 a month.

[33] I am mindful that PW3 might be desirous of helping the plaintiffs' case. Be that as it may, I find his testimony to be credible and consistent with the totality of the evidence. Based on PW3's testimony and the documentary evidence (ie the salary payment slips), I am satisfied that the deceased had indeed been gainfully employed prior to his arrest and death.

Testimony of PW4 (ie P2)

[34] PW4's testimony is this. She has one older sister, two younger sisters and one younger brother. The identification cards and birth certificates of PW4 and her siblings were produced at pp 4–9 of the Common Bundle of Documents marked as 'B1'. The deceased had given her mother (ie P1) a monthly stipend of approximately RM800 to RM900 a month. The deceased had also paid for P1's car's monthly instalments, amounting to RM500 a month. The rent for the family home had been RM250 a month.

The defendants' breaches of duty

DW1 (ie the first defendant, the arresting officer)

[35] DW1 is the arresting officer in charge of the deceased's arrest. He had knowledge that the deceased was ill at the time of his arrest. During cross-examination, DW1 admitted that he was informed by P1 that the deceased had been ill at the time of the arrest. And that P1 handed several documents to DW1 as evidence of the deceased's numerous ailments.

[36] It is my finding that DW1 had refused to accept the deceased's medicines when they were being handed to him and the other police personnel present at the deceased's home. I believe P1's evidence that she had tried in vain to hand over the medication to the police officers present during the deceased's arrest. DW1 claims that P1 informed him that the deceased's medication were at his mother's house. This seems implausible. Bearing in mind the deceased's ill health at the time of his arrest, it makes no sense for the deceased or P1 to store the required life-dependent medicines at his mother's house.

[37] Moreover, DW1 failed to record these important matters anywhere in his pocket book or subsequently in the station diary. He also failed to mention any of the above in his arrest report. Failure to record such important information is a breach of DW1's statutory duty as a police officer (see reg 2(a)(46) of the Police Regulations and r 34 of the Lockup Rules).

[38] DW1 testified that he had informed his superiors regarding the deceased's health condition and the fact that the deceased required medication. However, DW1 failed to record such purported conversation. This claim seems improbable because if DW1 had indeed notified his superiors of the deceased's condition, DW2 as the investigating officer would have been appraised of the relevant information. However, DW2 during cross-examination stated that on 29 June 2017 he was only informed of the deceased's arrest. The deceased's medical condition was only made known to him on 3 July 2017 by DW1 when DW2 returned from the holidays:

Q: Okay, so bermaksud *kamu sudah mengetahui ada ubat-ubatan ini, pada 29/06/2017* ada ubat-ubat ini, setuju?

A: *Tidak setuju* Yang Arif.

Q: Godness. Kamu tidak tahu apa-apa orang ini sakit?

A: *Saya hanya dimaklumkan tentang tangkapan Yang Arif sebab saya sedang bercuti.*

Q: Okay, *kali pertama kamu tahu orang ini sakit adalah pada bila?*

A: Adalah pada saya naik kerja, pada saya tamat cuti pada 2/07/2017, *3/07/2017* saya diserahkan semua dokumen oleh Sarjan Razali.

Q: Okay, 3/07/2017 lah. Kalau 29/06/2017 kita cuti, kamu kata tangkapan telah dimaklumkan kepada kamu, saya cadangkan *Razali pun sudah beritahu Mahkamah tadi, dia sudah maklumkan kepada bos dia berkenaan tangkapan dan juga dia ada ubat apa semua, dia sudah maklum. So, bermaksud kamu sudah tahu. 29/06/2017* ini kamu sudah tahu, setuju?

A: Tidak setuju Yang Arif.

[39] DW1's breach of duty is two-fold. First, he failed to record vital information regarding the deceased's health anywhere in the station diary or pocket book. Second, he failed to ensure that this vital information was relayed to the relevant officers taking responsibility over the deceased after him. In my opinion, this amounts to negligence on DW1's part. Due to the failure to adhere to his statutory duties, DW1's actions initiated a chain of events that would eventually cause or contribute to the death of the deceased. On the facts, it is my finding that DW1 had breached his duty of care towards the deceased. He had scant regard for the deceased's wellbeing. This contravenes s 20 of the Police Act as DW1 had failed to give assistance to the protection of the deceased's life.

DW2 (ie the second defendant, the investigating officer)

[40] DW2 is the investigating officer in the deceased's case for which he had been arrested. DW2 owed a duty of care towards the deceased as the main officer in charge of the deceased's case. I find that DW2 had breached his statutory duty as the investigating officer and as a police officer, and this breach contributed in causing the deceased's death.

[41] DW2 failed to ensure that the deceased underwent a medical check-up prior to being detained in police custody. No proof of the deceased ever undergoing a medical examination prior to being detained had been adduced in court. DW2's failure to do so as the officer in charge of the deceased amounts to a breach of r 10 of the Lockup Rules.

[42] DW2 failed to assign another officer to assume responsibilities over the deceased while he was away on holiday. DW2 failed to ensure that the deceased

was given the proper attention whilst in lockup and instead left him to languish in police lockup while DW2 was away. As a result of this failure, the deceased's medical needs and wellbeing were not preserved.

[43] DW2 failed to ensure that the lockup personnel provided medication to the deceased. During cross-examination, DW2 claimed that he had done so. However, this bare assertion is unsubstantiated. DW2 failed to record anywhere in the station diary or any pocket book adducedin court that such instructions had indeed been given. This failure coupled with the absence of any medicine in the deceased's body when he died suggest that DW2 never gave any such instructions. I find that DW2's negligent conduct of the deceased's case had contributed to the deceased's death.

DW3 (ie the fifth defendant)

[44] DW3 was in charge of registration at the lockup at the material time. He was the officer who had received the deceased's medication from P1. DW3 signed the 'Borang Penyerahan Ubat OKT' in which he acknowledged receipt of ten types of medicines for the deceased. This establishes that DW3 had personal knowledge that the deceased had been ill at the time of his detention and as such would require constant medical attention. However, DW3 breached his statutory duties.

[45] DW3 failed to record in the station diary or anywhere in the lockup that the deceased was ill and needed his daily medication. This failure to record such a vital piece of information amounts to a breach of reg 2(a)(46) of the Police Regulations. Under cross-examination, DW3 acknowledged that it is mandatory to record every action taken by an officer in the station diary.

[46] DW3 failed to clearly inform the deceased that he had to ask the officers in the lockup to be given his medicine when he needed them. DW3 stated in evidence that the deceased was informed of the above and that the deceased was said to have understood and nodded his head during registration. However, I find this bare assertion to be unproven. DW3 admitted during cross-examination that he made no note of this conversation with the deceased ever taking place, Further, there are no documents adduced in court to substantiate this.

[47] DW3 failed to inform the other police officers subsequently coming to be on duty of the deceased's condition and medical needs. Thus, he had failed in his duties as the Penyelia Pendaftaran and an officer on duty at the lockup to ensure that the deceased's medical needs and wellbeing are met. DW3 gave evidence that he had informed the other officers 'melalui percakapan'. Again, this is an unsubstantiated bare assertion. If such a briefing had taken place, it

would not be unreasonable to expect that a note of it would have been present in any of the station diary pages adduced in court during trial. Further, if such a briefing had indeed taken place, surely the other officers on duty would be appraised of the deceased's ailments and attended to his needs. But this was not done. It is my finding that DW3's negligence played a role in causing the deceased's death.

DW4 (ie the fourth defendant, the lockup sentry)

[48] DW4 was on duty as the lockup sentry on the day of the deceased's demise. My finding is that DW4 had committed breaches of his statutory duties. He failed to perform his rounds around the lockup cells every half hour and record it in the station diary. As such, he failed to adhere to the lockup's standing order issued by the Ketua Lokap. Paragraph 29 of the 'Perintah Tetap Ketua Lokap Berpusat Kuala Lumpur' ('Perintah Tetap') reads:

> Pastikan anggota bertugas di aras *sentiasa membuat rondaan setengah jam sekali* dan *catit dalam s/d.*

[49] Under cross-examination, DW4 testified that he made a round once at 12am, and a further time at 5.20am. The requirements of the standing order are mandatory to be followed, and a failure to do so amounts to a disciplinary issue and a breach of statutory duty. Paragraph 22 of the Perintah Tetap reads:

> *'Kegagalan mematuhi semua arahan diatas adalah menjadi satu kesalahan ingkar perintah dan boleh diambil tindakan tltertib.'*

[50] It seems to me that had DW4 complied with the standing order, he would have been able to keep an eye on the deceased's health condition and afford him the necessary medical attention. Further, I find that DW4 had breached s 20 of the Police Act by failing to give assistance in the protection of the deceased's life. From the CCTV recording, I observe that DW4 did not come to the deceased's aid when the latter had fallen over in his cell on the fateful day. Instead, DW4 opened the gates of neighbouring cells and enlisted several other OKTs (*orang kena tuduh*) to carry the deceased out of his cell and into a temporary holding cell. This act is a violation of DW4's statutory duty as a police officer. DW4 failed to maintain the deceased's wellbeing at that moment and exposed the deceased to the risk of potential harm from the other inmates.

DW5 (ie the 15th defendant, Pengawal Lokap Berpusat Jinjang)

[51] At the material time, DW5 had been one of the officers on duty at the lockup overseeing the welfare of the detainees. In his examination-in-chief, DW5 stated that he had been in charge of receiving and giving food to the

detainees, among other things. However, DW5 failed to record in the station diary or the whiteboard at the holding cells of anyone handing the detainees their food. There is no record whatsoever adduced in court in the Bundle of Documents that the deceased had been given food or his medicines. This is in breach of reg 2(a)(46) of the Police Regulations.

[52] DW5 demonstrated a lack of understanding of the Lockup Rules, bizarrely insisting that the same do not apply to police lockups when in his defence he had already stated that the Lockup Rules had indeed been complied with (see para 23(j) of the defence). A failure to appreciate the Lockup Rules, compounded with a clear disregard of the standing order by not recording every action taken by an officer in the lockup, demonstrates that DW5 had breached his statutory duty owed to the deceased.

[53] When the deceased collapsed in his cell on 10 July 2017, DW5 and the other officers around him at the time breached the standing order and the Lockup Rules by enlisting the other inmates to carry the deceased out of the cell. No officer could be seen on all the CCTV footage to have helped the deceased out of his cell. Further, DW5 breached s 20 of the Police Act by failing to provide assistance in the protection of the deceased's life. This is seen in the multiple CCTV recordings shown during the trial in which none of the officers involved, DW5 included, had given any form of assistance to the deceased. I find that DW5's negligent acts and omissions had also contributed to the deceased's death.

DWS (ie the 17th defendant, Pengawal Lokap Berpusat Jinjang)

[54] DW6 at the material time was one of the officers on duty at the detention area of Lokap Berpusat Jinjang. My finding is that DW6 had breached his statutory duties and contributed to the deceased's death. DW6 failed to ensure that information on the deceased's health and his medical needs are properly recorded in the station diary and the whiteboards in the detention area. DW6 further failed to make a note of the deceased's alleged condition (according to his witness statement, 'kesesakan nafas', 'lemah', 'mata pejam separuh') after he had collapsed in his cell. This failure contravenes reg 2(a)(46) of the Police Regulations.

[55] DW6 during the course of his duties had failed to ensure that the deceased duly received his medication in the lockup. Not a single shred of evidence had been adduced before the court of the above. DW6 breached s 20 of the Police Act by failing to provide assistance in the protection of the deceased's life. After the deceased collapsed in his cell, DW6 failed to render any form of assistance to the deceased. Even after the deceased had been brought to the temporary holding cell, DW6 once again failed to render any

assistance to the deceased. During cross-examination, DW6 stated that he did not give any medical attention or check on the deceased's condition because 'itu bukan bidang saya'. It is my finding that the negligent acts and omissions on the part of DW6 in failing to give medical assistance to the deceased had contributed to the death of the latter.

DW7 (ie the 20th defendant, Ketua Lokap Berpusat Jinjang)

[56] DW7 at the material time was the Ketua Lokap Berpusat Jinjang in which the deceased was held. All officers on duty at the lockup were under his command and control. I find that DW7's negligent acts and omissions caused the death of the deceased. As Ketua Lokap, DW7 breached r 10 of the Lockup Rules when he failed to ensure that the deceased was brought before a medical officer for a medical examination to determine if he had been fit to be detained in lockup. This is especially damning because DW7 testified that the deceased should have been put in hospital, not in the lockup.

[57] As Ketua Lokap, DW7 breached reg 2(a)(46) of the Police Regulations when he neglected to record in the station diary or anywhere else of his meetings and observations with the deceased whilst the latter was in lockup. DW7 failed to record anywhere in the station diary or even on whiteboards around the lockup that the deceased had been ill and needed constant medical attention. This is despite DW7 having knowledge of the deceased's health condition since the first day of the deceased's detention. Under cross-examination, DW7 testified that he disagreed about putting the deceased into lockup due to his critical illness and instead the deceased belonged in a hospital:

> Q: Dalam kes ini, OKT dalam kes ini *dibekalkan dengan ubat-ubatan bermakna dia mempunyai penyakit.* So, *kamu tahu* dari tarikh mana OKT ini sakit, 29.06.2017 tarikh pertama?
>
> A: *Daripada hari pertama* lagi.
>
> Q: Okay, bagus. So, kamu mempunyai pengetahuan dari tarikh pertama OKT dimasukkan ke dalam lokap?
>
> A: Betul Yang Arif.
>
> Q: Dia ini sakit dia perlukan ubat?
>
> A: Betul Yang Arif.
>
> Q: Dan sebenarnya kalau saya katakan kamu tidak berpuas hati dengan ASP Hngh?
>
> A: DSP.
>
> Q: Sorry, DSP Hngh dalam kes ini kerana DSP Hngh kata masukkan juga dalam lokap?
>
> A: Ya, ada antara saya dengan DSP Hngh kami bertekak sebab *saya tidak setuju dia*

dimasukkan sebab apa, I look on it because dia ini critical illness, itu.

Q: So, bermaksud kamu pun bersetuju *orang ini tidak seharusnya dimasukkan ke dalam lokap?*

A: *Ya* Yang Arif.

Q: So, saya cadangkan ini menjadikan imperative, satu perkara yang amat penting bahawa kebajikan orang ini diutamakan, setuju?

A: *Setuju, OKT ini sepatutnya walaupun ditahan sepatutnya dia kena letak di hospital.*

Q: Bukan di lokap?

A: *Betul bukan di lokap.*

Q: Setuju ya?

A: Ya Yang Arif.

Q: Tetapi kamu telah diarahkan.

A: Kami ikut arahan.

[58] DW7 as Ketua Lokap neglected to ensure that the deceased received the necessary medical care and attention. He claimed to have briefed the officers under him about the need to afford extra care to the deceased but no record of this had been made nor adduced in court during the trial. I conclude from the officers' inaction when the deceased fell over in his cell and the absence of medicine in the deceased's body when he died, that DW7 had failed in his statutory duties to ensure the protection of the deceased's life. He therefore breached s 20 of the Police Act.

[59] DW7 failed to put in place a proper system or standard operating procedure (SOP) to administer medicine to inmates who required them. This failure resulted in the officers and sentries in charge of the lockup being oblivious to the deceased's medical needs. He further failed to ensure that the officers under his command adhere strictly to the standing order. It is evident from the CCTV footage shown during the trial that no officers could be seen carrying the deceased out of his cell and instead it was several OKTs who did so.

[60] The 19th defendant can be seen in multiple shots of the CCTV footage having a cigarette in his hand and mouth when escorting the deceased from the temporary holding cell to the Black Maria gate behind the lockup building. This is in violation of para 7 of the standing order where tobacco is expressly prohibited at all times while on duty. Paragraph 7 of the Perintah Tetap reads:

> Dilarang sama sekali membawa apa-apa bahan larangan semasa bertugas atau membekalkan kepada OKT (*tembakau*, s/api, alat2 perhubungan dll).

[61] DW7 could not show during the trial that any form of disciplinary action had been taken against the 19th defendant or the other police officers involved. It is my conclusion that the negligent acts and omissions on the part of DW7 and the officers under his command had caused or contributed to the death of the deceased. There was a failure in the chain of command and the channelling of important information concerning the deceased. Under cross-examination, DW7 admitted that the deceased's death had been as a result of the police's negligence and omissions:

> Q: Dan saya katakan *hasil semua kegagalan ini telah menyebabkan kematian kepada si mati*, unfortunately this is the end result. *Dari permulaan tangkapan sehinggalah ke akhirnya menyebabkan kematian.* Unforlunately, series of event took place ultimately leading to the death, setuju?
>
> A: Setuju.

DWS (ie the 22nd defendant)

[62] DW8 had been the investigating officer assigned to conduct investigations into the deceased's death. I find that he had failed to conduct a proper investigation of the deceased's death. His failures included the following: (i) failed to make a finding on whether a failure to record in the station diary that a detainee was sick amounts to an omission; (ii) failed to investigate if the standing order had been complied with in this case; (iii) failed to investigate if the Lockup Rules had been complied with; and (iv) failed to investigate if there had been an abuse of power on the part of the police officers on duty when ordering the other inmates to carry the deceased out of his cell.

[63] DW8 failed to ensure that the second sample bag tagged 'SH2' containing the deceased's stomach contents and bile liquid reached the Jabatan Kimia along with 'SH1' for chemical analysis. The second sample bag 'SH2' went missing and remains unaccounted for. This amounts to negligence in the investigating process.

[64] DW8 only extracted CCTV footage from the date of the incident ie 10 July 2017 when conducting his investigations. It appears to me that itself is insufficient for DW8 to conduct a proper investigation into the deceased's death. DW8 could not possibly be able to make a finding whether the deceased had been given his medicine when only reviewing recordings on the day he died. It is my conclusion that DW8 failed in his statutory duties to conduct a proper investigation into the deceased's death.

The other defendants

[65] The other defendants (ie third defendant, sixth defendant, seventh defendant, eighth defendant, ninth defendant, tenth defendant, 11th

defendant, 12th defendant, 13th defendant, 14th defendant, 16th defendant, 18th defendant, 19th defendant, 21st defendant, 23rd defendant and 24th defendant) did not attend court to testify:

(a) the third defendant was the police officer who was in charge of the police officers in relation to the arrest and investigation of the deceased's case;

(b) the sixth defendant, seventh defendant, eighth defendant, ninth defendant, tenth defendant, 11th defendant, 12th defendant, 13th defendant, 14th defendant, 16th defendant, 18th defendant and 19th defendant were among the police officers on duty at Lokap Berpusat Jinjang;

(c) the 21st defendant took over the duties of the 20th defendant as Ketua Lokap Berpusat Jinjang at all material times after the 20th defendant had been transferred to another department;

(d) the 23rd defendant was the Ketua Polis Daerah Sentul (OCPD) at the material time; and

(e) the 24th defendant was the Inspector General of Police at the material time.

[66] The plaintiffs invited me to invoke s 114(g) of the Evidence Act 1950 owing to the failure of these other defendants to attend court to testify and defend the case against them. The said section reads:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who *withholds* it;

[67] I do not think making an adverse inference against these other defendants is warranted purely because of their absence from court. The operative word in s 114(g) of the Evidence Act 1950 is 'withhold'. There must be evidence of withholding or suppression of material evidence (see *DNC Asiatic Holdings Sdn Bhd & Ors v Honda Giken Kogyo Kabushiki Kaisha & other appeals* [2020] 1 CLJ 799 at p 821). Here, there is no evidence of any withholding or suppression of material evidence simply because those other defendants did not testify. In these circumstances, I do not think drawing an adverse inference against the defendants pursuant to s 114(g) of the Evidence Act 1950 is justified.

[68] Whether or not the defendants give evidence, the burden of proof lies on the plaintiffs (see ss 101, 102 and 103 of the Evidence Act 1950). In *Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175, the Federal Court said:

> *In a negligence action the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence*. The plaintiff cannot succeed without proof of the defendant's negligence. 'Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts which are the subject ofinquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself.

[69] It is my finding that the plaintiffs have successfully discharged their duty to prove their case. This is in light of the evidence produced by the plaintiffs in the Bundle of Documents as well as the oral evidence led in court. On a balance of probabilities, the plaintiffs have proven that the defendants had been negligent and derelict in their duties, which had caused the deceased's death.

[70] Arising from my findings of negligent acts and omission against the defendants, I hold that the 25th defendant's vicarious liability is established. The 25th defendant is the Government of Malaysia. Pursuant to s 5 of the Government Proceedings Act 1956, the government is liable for any wrongful act done or any neglect or default committed by any public officer. The relevant police officers in the present case are deemed to be the agents of and to be acting under the instructions of the government.

THE DEFENDANTS' SUBMISSION

[71] The defendants submit that mental and physical examination of the deceased was made before and after being placed in the lockup. According to the defendants, the deceased was in good physical and mental condition and never complained about his health to any of them. I do not accept this because there was never any evidence of a mental or physical examination having been conducted on the deceased at the material time. No record of any such examination is produced in any of the Bundle of Documents adduced during the trial.

[72] The defendants rely on the case of *Tan Sri Norian Mai & Anor v Suzana Md Aris* to argue that the police had acted reasonably in this case. The defendants submit that the police did not possess the necessary skills and tools of a medical practitioner, and as such had carried out their duties properly by bringing the deceased to the hospital for treatment when he collapsed. In *Norian Mai*, the Court of Appeal said:

> [27] ... It had not been shown to us how and under what circumstances that the police had been negligent. On the contrary, there is evidence that the *police had*

acted diligently and promptly by bringing the deceased to the Rawang clinic for medical treatment after the deceased vomitted blood and complained of stomach pain. It is not for the police to decide on the type of medical treatment for the deceased or to direct the medical attendant in the clinic on the proper medical treatment to be given to the deceased. The police did not possess the necessary skills and tools of a medical practitioner'

[73] The court in *Norian Mai* held on the evidence there that the police had acted 'diligently and promptly' by bringing the deceased in that case to the clinic for medical treatment. However, on the facts here, the defendants had not acted promptly or diligently in rendering aid to the deceased before and after his collapse. They were aware that the deceased was a person who had been in dire need of medical attention from the moment of his arrest to the time that he was put in the lockup. The evidence and CCTV recording shows that the defendants failed to make any attempt to try and save the deceased's life. Against police standard operating procedures and the Perintah Tetap, the defendants had enlisted the help of other inmates from other cells to carry the deceased from his cell to a temporary holding cell. In addition, the defendants did not render any medical aid nor made any effort to assist the deceased or physically check on him.

[74] The defendants further knowingly exposed the deceased to further potential health hazards by openly smoking when carrying him out of the temporary holding cell. The defendants maintain that at the material time before the deceased arrived at the hospital, he had allegedly showed signs of 'sesak nafas'. If this was true, smoking beside the deceased in such a state would surely further endanger his life. On the evidence, it would appear that the defendants were lackadaisical and had showed no urgency whatsoever in wanting to transport the deceased to the hospital for urgent medical treatment. I conclude that the defendants had not acted reasonably nor prudently.

[75] The defendants assert that they took action to bring the deceased to the hospital when he fell over at his cell. That is poor consolation given that the deceased was 'brought in dead' to Hospital Kuala Lumpur. It seems to me that the deceased might already be dead when he was at the temporary holding cell. The CCTV footage shows one of the inmates checking on the deceased during that time and gesturing with a crooked index finger to indicate that the deceased had died. I also observe that the deceased's body appeared to be lifeless as there was no movement by him while he was at the temporary holding cell.

[76] The defendants submit that there is no SOP as regards giving medicine to the deceased at the lockup as the police are not trained to give medicine. They told the deceased to ask as and when he needs to take his medicine since only the deceased know when and what medicine is needed. Further, the

deceased was put at a cell (LG01) which is near the table of the staff on duty so that the deceased can be monitored more closely. That appears to me to fall far short of fulfilling the defendants' duty of care to the deceased. The facts remains that the deceased was not provided with a medical examination following admission to the lockup (pursuant to r 10 of the Lockup Rules). If that were done, possibly the deceased might have been found to have been unfit for imprisonment. In fact, it was the 20th defendant's (DW7) testimony that the deceased ought to have been put in a hospital, not in the lockup. At the very least, the deceased's need for daily medication could have been established and a system put in place for such medicationto be properly provided. Instead no record or journal entry was made and responsibility for the safe custody of the deceased was passed from one officer to another, seemingly oblivious of his medical condition.

CORONER'S INQUEST

[77] An inquest into the deceased's death was conducted in the Kuala Lumpur Coroner's Court. In her verdict, the learned coroner found, inter alia, that the deceased's death had been caused by the police's negligence in carrying out their statutory duties and unlawful omission by not providing him with the necessary medication and not affording him the necessary medical attention that he had needed. An extract of the learned coroner's verdict reads:

> f. *Adakah sesiapa vang bertanggungjawab secara jenavah berhubung kematian si mati. tanpa membuat apa-apa dapatan mengenai liability jenayah orang itu*
>
> i) Daripada keseluruhan keterangan, dapat dirumuskan jelas punca kematian si mati adalah disebabkan oleh serangan jantung. Namun begitu, tidak dapat dinafikan bahawa kemungkinan terdapat pengabaian salah (*unlawful omission*) dari pihak polis sehingga menyebabkan kematian si mati dengan cara tidak memberikan ubat-ubatan untuk penyakitnya dan tidak membuat tindakan-tindakan sewajamya bagi memastikan kesihatan si mati sentiasa dalam keadaan yang terbaik dan terkawal.
>
> ii) Sekiranya si mati diberikan ubat mengikut jadual dan si mati diberikan rawatan segera, berkemungkinan kematian si mati dapat dielakkan.
>
> iii) Pihak lokap seharusnya memastikan rawatan dan perhatian penuh diberikan terutamanya apabila pihak lokap sendiri yang mengambil keputusan untuk menerima tahahan-tahanan berisiko tinggi dan mempunyai pelbagai penyakit kronik seperti si mati.
>
> iv) Sehubungan itu, atas alasan-alasan yang telah dinyatakan saya membuat dapatan fakta bahawa ketinggalan atau kegagalan pihak penjara Berpusat Jinjang menggunakan kuasa mereka dibawah peruntukkan undang-undang yang telah dinyatakan telah turut menyumbang kepada kematian si mati.

[78] The coroner's verdict was not challenged by the defendants. In fact at the inquest, the Attorney General's Chambers submitted that the police had been negligent and derelict in their duties, thus causing the death of the deceased. Be that as it may, I appreciate that the coroner's inquest is not a trial. There are no parties to prosecute and to defend. It is only an inquiry as to the cause of death pursuant to s 337 of the Criminal Procedure Code. There is no conviction or punishment at the end of it. The coroner's verdict does not determine any question of criminal liability or civil liability (see the Court of Appeal case of *Teoh Meng Kee v Public Prosecutor* [2014] 5 MLJ 741; [2014] 7 CLJ 1034). Accordingly, I do not rely on the coroner's verdict in arriving at my decision.

[79] In similar vein, I do not rely on the findings of SUHAKAM (Suruhanjaya Hak Asasi Manusia Malaysia) in arriving at my conclusions. SUHAKAM had conducted an investigation into the deceased's death and presented the following findings and recommendations:

DAPATAN SURUHANJAYA

23. Hasil dari keterangan yang direkodkan, Suruhanjaya menyimpulkan seperti berikut:

a) Tiada unsur jenayah dan tidak ada bukti kekerasan digunakan ke atas OKT semasa penahanan

b) Tiada pemeriksaan kesihatan dari Pegawai Perubatan ke atas OKT sebelum dimasukkan ke lokap dan sepanjang penahanan

c) Kelemahan pengurusan lokap dalam membekal dan merekod pemberian ubat kepada Si Mati ketika ditahan di lokap Adalah menjadi tanggungjawab pegawai/anggota lokap untuk. memastikan OKT-OKT yang sakit mendapat ubat-ubatan mereka mengikut preskripsi doctor kerana ubat-ubatan berkenaan berada dalam simpanan mereka dan bukan di dalam simpanan OKT-OKT.

SYOR SURUHANJAYA

ii. Kementerian Dalam Negeri (KON), Kementerian Kesihatan Malaysia (KKM), Kementerian Kewangan Malaysia (MOF) hendaklah bekerjasama dengan Polis DiRaja Malaysia (PDRM) untuk memastikan Peraturan 10, Kaedah-Kaedah Lokap 1953 dapat dilaksanakan.

iii ... PDRM harus mewajibkan Pegawai Penyiasat, yang mengetahui seseorang tahanan menghidapi penyakit yang serius, memastikan tahanan berkenaan dibawa untuk pemeriksaan kesihatan seluruh oleh doctor di hospital/pusat kesihatan kerajaan terlebih dahulu sebelum disahkan sesuai untuk ditahan di mana-mana lokap.

iv. Amalan mencatatkan keadaan OKT di dalam Buku Rekod dilaksanakan secara konsisten dan jika berlaku kes di mana OKT jatuh sakit, buku tersebut boleh dirujuk untuk memastikan OKT mendapat rawatan kesihatan. Catatan rekod

A adalah penting untuk mengelakkan kejadian di mana OKT tidak mendapat rawatanlubat-ubatan yang sepatutnya kerana ketiadaan rekod.

DAMAGES

B **[80]** Next, I consider the damages to be awarded in this case.

Dependency claim, loss of support

[81] The requirements of s 7(2) of the Civil Law Act 1956 is satisfied. This C action is brought for the benefit of the wife and children of the deceased. The dependents of the deceased are:

(a) P1 (wife of the deceased);

(b) Anushalini a/p Benedict (daughter of the deceased), age 20 at the time of D the deceased's death;

(c) P2 (daughter of the deceased), age 18 at the time of the deceased's death;

(d) Emily alp Benedict (daughter of the deceased), age ten at the time of the E deceased's death;

(e) Xavier a/l Benedict (son of the deceased), age four at the time of the deceased's death; and

(f) Roshinee a/p Benedict (daughter of the deceased), age one at the time of F the deceased's death.

[82] The requirements under s 7(3)(iv)(a) of the Civil Law Act is also fulfilled. The deceased was 43 years old and was gainfully employed at the time of his death. Following the formula prescribed in s 7(3)(iv)(d) of the Civil Law G Act, the multiplier is 8.5 years. Namely 60 minus 43 and divide by two. As for the multiplicand, the evidence shows that the deceased's monthly income ranges from approximately RM1,200 to RM1,500. PW1 testified that the deceased would give her approximately RM800 to RM900 a month for household expenses including expenses for their five children. This evidence is H reasonable and had not been credibly challenged by the defendants. I accept that the multiplicand is RM10,800 per year. Namely RM900 multiplied by 12 months. I therefore award RM91,800 for loss of support. Namely RM10,800 (multiplicand) multiplied by 8.5 (multiplier).

I **[83]** The defendants sought to rely on the one-third reduction principle when submitting that the plaintiffs' claim for RM900 a month for dependency ought to be reduced to RM400 based on the one-third principle. However, the defendants' interpretation of the one-third reduction principle in those terms is flawed. The approach taken by the courts is to deduct one-third from the

deceased's wages as living expenses, leaving the remainder as surplus income (see the High Court case of *Low Suit (MW) & Tan Mee Kiau v Lim Sun Hiang & Anor* [1991] 3 MLRH 539; the Court of Appeal case of *Takong Tabari v Government of Sarawak & Ors and another appeal* [1998] 4 MLJ 512; [1998] 2 MLRA 101). In the instant case, RM800 to RM900 is the sum actually received by P1 from the deceased. No deduction applies to that. The monthly wages of the deceased is approximately RM1,200 to RM1,500 a month. Even if the one-third reduction principle was applied to that, the result would be no different. Namely RM900 a month for loss of support.

Bereavement

[84] P1, being the deceased's wife, is entitled to the claim for damages for bereavement of RM30,000 under s 7(3A) and (3B) of the Civil Law Act and I so award.

Funeral expenses

[85] Under s 7(3)(ii) of the Civil Law Act, damages may be awarded in respect of the funeral expenses of the deceased. The plaintiffs claim a sum of RM10,000 in this regard. But no receipts were adduced during the trial to prove that this sum had been incurred as funeral expenses. Be that as it may, I take judicial notice that funeral expenses were surely expended for the deceased by the plaintiffs. The defendants proposed a sum of RM4,000 for funeral expenses, as agreed by P1 during cross-examination (see p 25 of the defendants' written submissions). As such, I award RM4,000 for funeral expenses.

Pain and suffering

[86] The defendants argue that only one claim can be brought by the plaintiffs, either under s 7 (dependency claim) or s 8 (estate claim) of the Civil Law Act. In other words, the plaintiffs are entitled to one claim only (see para 52 of the defendants' written submissions). That is incorrect. The plaintiffs are entitled to bring both a dependency claim under s 7 of the Civil Law Act as well as an estate claim under s 8 of the Civil Law Act. Section 8(5) of the Civil Law Act stipulates that the rights thereunder for the benefit of the estate of a deceased person is in addition to and not in derogation of the rights conferred on the dependants of a deceased person under s 7 of the Civil law Act. It reads:

> The rights conferred by this section for the benefit of the *estate of deceased persons* shall be in *addition to and not in derogation* of any rights conferred on the *dependants of deceased* persons by *section 7* ...

[87] The plaintiffs pleaded in the statement of claim that the actions, omissions, negligence and breach of duty by the defendants had caused severe

pain and trauma to the deceased before he died (see para 31.2 of the statement of claim). Based on the evidence, it is plausible that the deceased would have experienced pain and suffering in the days leading up to his death. The deceased was detained on 29 June 2017. He died on 10 July 2017. He was incarcerated for approximately 11 days. From the CCTV recording, I observe that the deceased's speech appeared to be faint. I believe PW1's evidence that the deceased complained about being unwell during his incarceration. Likely as a result of not receiving his medication. In my view, an award for pain and suffering is justified.

[88] Damages awarded for pain and suffering is to compensate for the physical pain and mental anguish attributable to the injury caused. In *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295, the Federal Court held that pain and suffering is assessed by looking at the nature and the period of the injury suffered while being guided by previous awards. The court said (at p 297):

> Under the heading of pain and suffering and loss of amenities, the *quantum is mainly assessed on the nature of injuries sustained and the period* of hospitalization, and in arriving at a figure, the court is *guided by previous awards* in cases involving similar type of injuries with allowances being given as to the plaintiff's age, marital status, his special position socially or in business, depreciation or appreciation of money value and other relevant circumstances.

[89] In *Azizi bin Amran v Hizzam bin Che Hassan* [2006] 4 MLJ 555; [2006] 2 CLJ 821; [2006] 4 AMR 381, the Court of Appeal said (at p 561 (MLJ)):

> [9] ... In this regard, we would agree with the submission of learned counsel for the plaintiff that the defendant must *take his victim as he finds him*. This is the *egg-shell skull* rule. On this point, in the case of *Watts v Rake* [1960] 108 CLR 158, Dixon CJ at p 160 had this to say:
>
> > *If the injury proves more serious in its incidents and its consequences because of the injured man's condition, that does nothing but increase the damages* the defendant must pay. To sever the remaining leg of a one-legged man or put out the eye of a one-eyed man is to do afar more serious injury than it would have been had the injured man possessed two legs or two eyes. But for the seriousness of the injury the defendant must pay. '*A negligent defendant must take his victim as he finds him and pay damages accordingly*. The fact that the person injured was peculiarly susceptible to ensuing complications that would not in a normal person have followed from the injuries received, or that the person injured already had a disability which made the injury the more disabling — eg the loss of an only eye does not mean that damages are not to be assessed according to the circumstances of the particular case.

[90] Applying the egg-shell thin skull rule, the defendants must take the deceased as they had found him. He had been a sickly man and required

constant medical attention. However, the defendants had failed to provide him with the necessary care and medication. By not doing so, the defendants had exacerbated the deceased's condition and caused him pain and suffering that eventually led to his death.

[91] On quantum, I refer to damages for pain and suffering awarded in road accident cases as a guide. In *Kalaivanan a/l Sundarajoo & Anor v Poo Cheng Hock* [2017] 9 MLJ 806 at p 814; [2017] 4 MLRH 370 at p 376, the High Court remarked that in road accident cases an award of RM50,000 for pain and suffering is within the range of past awards. In the circumstances, I am of the view that a sum of RM50,000 is a fair and reasonable sum to be awarded as general damages for pain and suffering suffered by the deceased.

[92] The defendants submit that the plaintiffs are not entitled to damages under this heading as the deceased was brought in dead to the hospital. I suppose their meaning is that death was instantaneous. I disagree. It is plausible that the deceased would have suffered pain and suffering from the time of arrest to the final moments leading up to his death. This is in view of his medical condition and the fact that the deceased had not been given his life-dependent medicines.

Aggravated damages

[93] The plaintiffs had pleaded in the statement of claim for this head of damages to be awarded (see prayer 6 of the statement of claim). I agree that the plaintiffs are entitled to aggravated damages due to the defendants' negligence and omissions which had brought grief and distress to the plaintiffs.

[94] The jurisprudence of aggravated damages in cases of custodial death can be gleaned from the recent Federal Court case of *Koperal Zainal*. The High Court found the defendants there to be negligent and their negligent acts and omissions to be the cause of death of the deceased in that case. In a 6–1 majority decision, the Federal Court held that s 8(2) of the Civil Law Act acts as a complete bar to an estate's claim for exemplary damages. Earlier, the High Court had awarded RM200,000 as exemplary damages. The Court of Appeal affirmed the High Court's decision when the defendants appealed, which the Federal Court then overruled. The Federal Court affirmed the earlier decision in *Kugan*'s case, in which it was then held that s 8(2) of the Civil Law Act acts as a complete bar to exemplary damages. However, Her Ladyship Rhodzariah Bujang FCJ when delivering the majority decision stated the following on the issue of aggravated damages (at p 406 (MLJ); p 438 (MLRA)):

> [31] What Lord Neuberger said in *Ashley*'s case at p 996 para 102 is equally instructive on this point and is reproduced below:

> 102 Aggravated damages are awarded for *feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed*, or in which its aftermath was subsequently handled by the defendant.

In this case, there is *no denying the exacerbation of the abovementioned feelings by the very fact that the deceased had died due to the inaction of the ones who were there to enforce the law.*

[95] In the present case, the deceased had died due to the inaction and negligence of the police who were there to enforce the law. The deceased had been under the custody and control of the defendants, like in *Koperal Zainal.* There, the Federal Court substituted the sum of RM200,000 awarded as exemplary damages to be that under aggravated damages. Her Ladyship in *Koperal Zainal* went on to say (at pp 406–407; p 438 (MLRA)):

> [32] Therefore, based on the authorities cited above whilst at the same time giving due deference to the express prohibition in s 8(2) of the CLA, the respondents in this case should be entitled to be *compensated with aggravated damages which amount must reflect the sufferings of the deceased and at the same time the sheer abhorrence of the court against the negligent conduct of the appellants*, even though the degree of its seriousness is not on the same footing as other reporled cases where the deaths of the detainees were the result of physical abuse by their custodians. Factoring such feeling of the courl is permissible as held by Lord Hailsham in *Broome*'s case at p 1073:
>
> > In awarding 'aggravated' damages the *natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive* in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium.
>
> [33] Thus, I would answer the legal question posed in the affirmative and consequentially reaffirm the decision of this courl in Kugan's case. Consequentially, this appeal is allowed and based on the reasons I have elaborated earlier, *I would substitute the sum of RM200,000 awarded as exemplary damages to be that under aggravated damages.* I would, in furlherance of the same abhorrence mentioned above, make no order as to cost despite the success of the appellants in this appeal.

[96] Guided by the Federal Court judgment in *Koperal Zainal,* my view is that the plaintiffs are entitled to aggravated damages. In the circumstances, I consider a sum of RM100,000 to be fair and reasonable. I note that a figure of RM200,000 was awarded by the Federal Court in *Koperal Zainal.* Nevertheless, I do not think that I am necessarily bound by that figure. Firstly, that figure was first awarded by the trial judge as exemplary damages. The Federal Court then substituted that existing figure as aggravated damages. Secondly, the quantum of compensation that is appropriate should be left to the individual judge to determine in accordance with the facts and circumstances of each case, which vary widely. Here, a relevant factor

considered by me is that the extent of the infringement is more in the nature of negligent acts or omissions, rather than any deliberate withholding of medicine or positive acts of torture or Injury (see the dissenting judgment of Her Ladyship Nallini Pathmanathan FCJ at para [133] of the Federal Court judgment in *Koperal Zainal).*

[97] Moreover, there are distinguishing features in *Koperal Zainal* that are absent from the present case. First, it appears that the police had acted inhumanely towards the deceased in *Koperal Zainal* ('he') where he had deliberately been deprived of essential medication to treat his medical condition. Second, he had been behaving bizarrely, shouting and ranting while in detention, probably as a consequence of not having his medication. Third, he was accorded no medical treatment despite an express order made by the Magistrate during the remand hearing that he should be given adequate medical treatment. Fourth, he was isolated in a cell with no toilet and a bare cement floor on which to sleep. It appears that he did not eat or drink during his detention. He was deprived, not only of medication and medical care, but also of food, drink and sleep. He was also physically injured (see paras [38]–[42] of the Federal Court judgment in *Koperal Zainal*).

[98] The deceased's death is tragic and appears to have been avoidable, if the defendants had not been negligent or in breach of their statutory duties. As has been said, one death in custody is one too many. I echo the sentiments expressed by the Court of Appeal in *Kugan*'s case (at p 386 (MLJ); p 54 (CLJ)):

> [86] Custodial death cannot and should not happen in this country. There should be zero tolerance to any custodial death in all the remand centres in the country.

Special damages

[99] The plaintiffs claim RM5,500 as costs of obtaining letters of administration. This amount is supported by an official receipt in respect of legal fees and disbursements from the firm of solicitors which handled the administration proceedings (which is produced at p 331 of the Common Bundle of Documents marked as '82'). The letters of administration is necessary in order for the plaintiffs to institute this suit. I am satisfied that this claim is not too remote. Accordingly I allowed this claim.

[100] The plaintiffs also claimed RM3,500 for travelling costs to the hospital, police station, SUHAKAM, and the courts for the inquest proceedings. However no evidence was produced to substantiate this claim. Moreover, this claim was not particularised. I therefore disallowed this claim as it was not proven.

[101] I am guided by the following authorities. In *Yeap Cheng Hock v*

Kajima-Taisei Joint Venture [1973] 1 MLJ 230 at p 236, the High Court said:

> The general principle is that the plaintiff must be prepared to *prove* his special damages unless it has been agreed. It is not enough for him to write down the particulars and leave them for the court to decide. It is for him to *prove* them.

[102] In *Tan Lin Siew & Anor v Syed Hussein bin Alwi* [1987] 2 MLJ 53 at p 55, the Supreme Court cited the following:

> As regards the question of damages, I would put it in this way. Special damage in the sense of monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and *particularised* ... In my view, it is plain law – so plain that there appears to be no direct authority, because everyone has accepted it as being the law for last hundred years — that one can recover in an action only special damage which has been pleaded, and of course *proved*.

Misfeasance in public office

[103] The plaintiffs argue that the defendants had committed misfeasance in public office and claim RM100,000 as damages for such. I reject this claim as there is no basis for finding misfeasance in public office in the instant case.

[104] The tort of misfeasance in public office relates to deliberate dishonest conduct and abuse of power by a public officer. The key ingredients of the tort are:

(a) an abuse of public power or authority by a public officer;

(b) who either: (i) knew that he was abusing his public power or authority; or (ii) was recklessly indifferent as to the limits of his public power or authority; and

(c) who acted or omitted to act either with: (i) the intention of harming the plaintiff (targeted malice); or (ii) with the knowledge of the probability of harming the plaintiff, or with reckless indifference to the probability of harming the plaintiff.

[105] In *Tony Pua Kiam Wee v Government of Malaysia and another appeal* [2019] 12 MLJ 1 at p 47; [2020] 1 CLJ 337 at p 385, the Federal Court said:

> It is therefore an intentional tort. The element which receives the most emphasis is that of *bad faith*, ie the *abuse of power* and the *targeted malice* or the complete indifference to the effect of the abuse of power on the plaintiff or a class of such persons. It is also the element which makes this tort *hard to plead and to prove* as it is *only in rare circumstances that such facts subsist as would allow the plea* to remain on the record. *In many instances the plea is struck out as it is simply insufficient*. This is because, it is not every act or omission on the part of a public officer which lends

itself to the bringing of an action premised on this tort. It *requires outrageous conduct* with the requisite intention to injure and this serves as a safeguard to preclude a multitude of actions from being initiated.

[106] In my view, elements of 'outrageous conduct', 'bad faith' or 'abuse of power' on the part of the defendants and 'targeted malice' against the deceased are absent here. As explained in *Tony Pua*, not every action or omission by a public officer can be the basis to claim misfeasance of public office. The plaintiffs cited *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184; [2017] 6 MLRA 635. However, that case does not apply in this instance. On the facts here, there is no evidence of any assault or battery inflicted against the deceased. There was no physical abuse, torture or violence against the deceased. There were no continuous or repeated attempts by the defendants to hide the cause of death of the deceased and the persons responsible. Nor were there failure on the part of the defendants to inform P1 of the location of the deceased after his arrest or to provide her with access to the deceased.

CONCLUSION

[107] For the reasons above, I gave judgment in favour of the plaintiffs. There is no doubt in my mind that the defendants owed a duty of care towards the deceased who was under remand and in the custody of the defendants at the material time. It is my finding that the defendants had breached the duty of care by failing to provide the necessary medical attention to the deceased. On a balance of probabilities, I find that the actions and omissions by the defendants had caused or contributed to the deceased's death. I awarded the plaintiffs the following:

(a) RM91,800 for loss of support;

(b) RM30,000 for bereavement;

(c) RM4,000 for funeral expenses;

(d) RM50,000 for pain and suffering;

(e) RM100,000 as aggravated damages; and

(f) RM5,500 for the costs of obtaining letters of administration.

[108] I awarded interest at the rate of 5%pa on the above sums from the date of filing of the suit (ie 3 July 2020) to the date of payment. I ordered the defendants to pay RM40,000 in costs to the plaintiffs.

Plaintiffs' claim allowed.

Reported by K Selvaraju